

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUIS VILLEGAS, 05-B-2713,

Petitioner,

-v-

CARL HUNT, Superintendent,

Defendants.

DECISION and ORDER
07-CV-6552P

By Order dated November 15, 2007, the Court ordered petitioner to respond as to why his petition should not be deemed untimely pursuant to 28 U.S.C. § 2244 (Docket # 2). In the response filed on December 18, 2007 (Docket # 3), petitioner asserted that his trial counsel was directed to file a Notice of Appeal and, without petitioner's knowledge and despite his attempts to determine the status of his appeal, failed to do so, thereby prejudicing petitioner's ability to file within the one year statutory period. See, *Doe v. Menefee*, 391 F.3d 147, 159 (2d Cir. 2004) (quoting *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam) (The Second Circuit has found that "in 'rare and exceptional circumstances' a petitioner may invoke the courts' power to equitably toll the limitations period."). The Court notes, however, that "[t]o qualify for such treatment, the petitioner must establish that 'extraordinary circumstances prevented him from filing his petition on time,' and that he 'acted with reasonable diligence throughout the period he seeks to toll.'" *Id.* The Court cannot determine on this record that the petition is untimely. The determination of this issue will await the respondent's answer and further briefing on a more complete record. Accordingly,

IT HEREBY IS ORDERED as follows:

1. Respondent shall file and serve an **answer** to the petition, in accordance with Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts, no later than **February 22, 2008**. Further, the answer shall state whether a trial or any pre-trial or post-trial evidentiary proceeding was conducted. If any such proceeding was conducted, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court the transcript of the proceeding, together with any record(s) of such proceeding, and such documents will be filed in the official record of this case.

Respondent also shall file and serve by the above date a **memorandum of law** addressing each of the issues raised in the petition and including citations of relevant supporting authority.

Within thirty (30) days of the date this order is served upon the custodian of the records, the Clerk of Court or any other official having custody of the records of the proceedings in [ct of conviction (eg, Supreme)] Court at issue now before this Court shall submit such records to respondent or the respondent's duly authorized representative.

If petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court a copy of the briefs on appeal and the opinions of the appellate courts, if any, and such documents will be filed in the official record of this case.

Petitioner shall have thirty (30) days upon receipt of the answer to file a written response to the answer and memorandum of law.

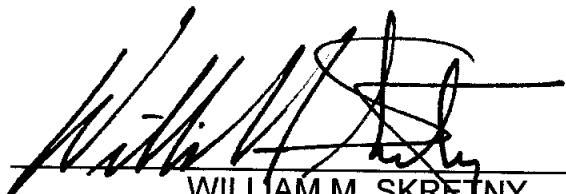
Within thirty (30) days of the date this order is filed with the Clerk of Court, respondent may file a motion for a more definite statement or a motion to dismiss the petition, accompanied by appropriate exhibits which demonstrate that an answer to the petition is unnecessary. The timely filing of such motion shall extend the time for filing an answer for fourteen (14) days, but the failure of the Court to act upon the motion within that time shall not further extend the time for filing an answer.

2. The Clerk of Court shall serve a copy of the petition (Docket No. 1), together with a copy of petitioner's response to the Court's order to show cause regarding the timeliness of the petition (Docket No. 3) and a copy of this order, by certified mail, upon respondent Superintendent of Groveland Correctional Facility and upon the Assistant Attorney General in Charge, 144 Exchange Street, Rochester, New York 14614. To advise appropriate Monroe County officials of the pendency of this proceeding, the Clerk of Court shall also mail a copy of this order to the District Attorney of Monroe County.

**PETITIONER MUST FORWARD A COPY OF ALL FUTURE PAPERS AND
CORRESPONDENCE TO THE ATTORNEY APPEARING FOR RESPONDENT.**

SO ORDERED.

Dated: 01/14, 2008
Buffalo, New York


WILLIAM M. SKRETNY
United States District Judge